

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 21, 2009

STATE OF TENNESSEE v. GARY DURHAM

Appeal from the Circuit Court for Lincoln County
No. S0800140 Robert Crigler, Judge

No. M2009-00738-CCA-R3-CD - Filed December 10, 2009

Appellant, Gary Durham, appeals the Lincoln County trial court's denial of alternative sentencing after his guilty plea to one count of burglary, one count of misdemeanor theft, and one count of vandalism under \$500. He received an effective sentence of four years to the Tennessee Department of Correction. In this appeal Appellant contends he should have received an alternative sentence. After a review of the record, we determine that the trial court properly denied alternative sentencing. Consequently, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Gary Durham.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Charles Crawford, District Attorney General, and Ann Fliler and Holly Eubanks, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual Background

Appellant was indicted by the Lincoln County Grand Jury in December of 2008 for one count of burglary, one count of theft under \$500, and one count of vandalism under \$500. On February 23, 2009, Appellant pled guilty to the charges with the length and manner of service of the sentence to be determined by the trial court at a sentencing hearing.

At the plea acceptance hearing, the State's attorney informed the trial court that had the case gone to trial, the proof would have established that:

[O]n March 25, 2005 there was the report of a burglary in the early morning hours at the Chuckwagon Restaurant here in Lincoln County.

Investigator Adam Eubanks went to that scene and found glass broken from a window, and glass fragments scattered on the floor beneath the window inside that restaurant. No other possible point of entry was found.

He inspected those fragments of glass and found what appeared to be a spot of blood. He collected that evidence and - - or actually sent the entire piece of glass with the suspected blood to the TBI Crime Laboratory. That was submitted the latter part of April of 2005 along with a request for DNA analysis or examination for confirmation of blood to see if DNA analysis was possible.

He heard back in August of 2008 that it was human blood and that they had found a match on the CODIS database to Gary L. Durham with the date of birth which corresponds with this gentleman who is before Your Honor today. At that point in time the investigator obtained a search warrant for a blood sample from Mr. Durham here, and served that along with the arrest warrant for burglary on Mr. Durham on September 9, 2008. The blood that was obtained with the search warrant was sent to the TBI Crime Laboratory, and on 10-27-08 they issued a report saying that it was a match. In other words, this was this defendant's blood on that glass from the burglary.

The trial court held a sentencing hearing at which the presentence report was introduced into evidence. The State also introduced various judgments from prior criminal convictions, including convictions for possession of contraband in a penal facility, third degree burglary, burglary, theft, and unlawful possession of marijuana, among others. Appellant's prior record also included convictions in Alabama for second degree assault and a conviction from Louisiana for simple burglary. Appellant chose not to present any proof at the sentencing hearing.

At the conclusion of the sentencing hearing, the trial court determined that one enhancement factor applied, that Appellant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114(1). The trial court placed "tremendous and enormous weight" on this enhancement factor "due to [Appellant's] extensive prior record." The trial court noted that due to the "uniqueness" of the timing of the convictions at issue, Appellant was a Range I, standard offender and that the range of punishment for the burglary conviction, a class D felony, was two to four years. For the misdemeanor convictions of theft and vandalism, Appellant faced an eleven month, twenty-nine day sentence. The trial court listed Appellant's lengthy prior criminal history and noted Appellant's acknowledged drug and alcohol abuse from the ages of "16 to 44." Finally, the trial court determined that Appellant's "potential for

rehabilitation is poor due to his being an 8th grade drop out” with a “poor employment history.” In conclusion, the trial court determined that confinement was necessary to protect society by restraining a defendant with a long history of criminal conduct. As a result, the trial court ordered Appellant to serve four years for the burglary conviction and eleven months and twenty-nine days for the theft and vandalism convictions. The trial court specified that the two misdemeanor sentences would run concurrently to the sentence for burglary.

Appellant filed a timely notice of appeal, challenging the trial court’s denial of alternative sentencing.

Analysis

On appeal, Appellant argues that he should not have been denied probation because he is “an addict,” was sentenced to less than eight years in incarceration, and does not fall within the parameters of Tennessee Code Annotated section 40-35-102(5).

At the time Appellant committed the offense in this case Tennessee Code Annotated § 40-35-102(5) provided as follows:¹

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration

A defendant who does not fall within this class of offenders “and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary.” *Id.* § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption, “[t]he trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration would result in successful rehabilitation” *State v. Byrd*, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); *see also* T.C.A. § 40-35-303(a). In this case, Appellant was convicted of burglary, a Class D felony as a Range I, standard offender and two misdemeanors. He is thus presumed a favorable candidate for alternative sentencing in the absence of evidence to the contrary.

¹The Sentencing Act was extensively modified in 2005. These amendments became effective on June 7, 2005. The legislature provided that the amendments would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id.* In this case Appellant did not execute such a waiver and his offense was committed prior to the effective date of the new act. Therefore, the amendments do not apply to Appellant.

All offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated § 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated § 40-35-103(5), which states, in pertinent part, “The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” *Id.* § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant’s untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *State v. Dowdy*, 894 S.W.2d at 305-06.

In this case, the trial court was especially concerned over Appellant’s extensive criminal history. Appellant, who was forty-five years of age, had a criminal history beginning in 1985, when he was twenty years old. Further, after he committed the crimes for which he pled guilty herein, Appellant pled guilty to a number of other felonies including introduction of contraband into a penal facility, auto burglary, two counts of theft, and burglary. Appellant also had convictions for public intoxication, reckless driving, violation of the seatbelt law, theft, driving without a license, resisting arrest, and assault. Appellant’s criminal history also included convictions from Alabama and Louisiana for second degree assault and simple burglary. Appellant’s extensive criminal record and his poor social and employment history reflect poorly on his potential for rehabilitation. The record amply supports the trial court’s denial of alternative sentencing.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE